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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

L. T. TAYLOR,

Defendant and Appellant.

E028762

(Super.Ct.No. FBA05877)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, James D. Dutton, Supervising Deputy Attorney General, and Michael T. Murphy, Deputy Attorney General, for Plaintiff and Respondent.

Defendant L. T. Taylor was charged with transportation of a controlled substance (Health & Saf. Code, § 11352 subd. (a))¹ and possession for sale of a controlled substance (§ 11351). It was further alleged that the amount of the controlled substance exceeded one kilogram of weight (§ 11370.4 subd. (a)(1)). Following a jury trial, defendant was convicted of transportation of a controlled substance and simple possession of cocaine, a lesser included offense to the possession for sale of a controlled substance charge. The allegation concerning the weight of the controlled substance was also found true. On January 8, 2001, defendant was sentenced to state prison for seven years.

FACTS

On May 17, 2000, at 2:20 in the morning, defendant was stopped by Officers Nester and Lefebure of the California Highway Patrol (CHP) while driving a van on Interstate 40. Officer Nester was assigned to the High Desert Narcotics Enforcement Team, which identifies drug courier indicators during high volume traffic stops in order to recognize possible drug trafficking activity. The officers pulled the van over after observing that it did not appear to have a license plate light, it was weaving from side to side and straddling the lanes of the highway, and it was traveling 50 miles per hour in a 70-mile-per-hour zone.

Upon stopping the van, Officer Nester noticed a strong odor of air freshener coming from the van, a radar detector mounted on the dashboard of the van, a road map on the right

¹All other statutory references are to the Health and Safety Code unless otherwise indicated.

front passenger seat, a pager, a drink cup, and a soda can.² Defendant's hand was shaking visibly when he handed Officer Nester his Ohio driver's license.

Upon checking the van's registration, Officer Nester learned that defendant was not the owner of the van and could not accurately identify the registered owner.³ When asked why he had come to California from Ohio, defendant stated that he had come with some relatives in order to attend the funeral of his uncle. Defendant was not sure of the location of the funeral, and was not forthcoming with the name of his uncle, which he later stated was Brown Jackson. Defendant also told the officers that he had left his relatives at a hotel in Long Beach in order to drive back to Ohio and was unsure of when they would be returning to Ohio. During this conversation defendant's voice was quivering and stammering, he avoided eye contact, shuffled his feet, and he was shaking and trembling.⁴ Defendant appeared to be extremely nervous throughout this conversation. Defendant was administered a field sobriety test by Officer Nester, which defendant passed.

Based on all of the above circumstances, Officer Nester became suspicious that defendant was involved in drug trafficking. As a result, Officer Nester asked for, and

² These items, when viewed together, are indicators of drug trafficking that police are trained to look for.

³ The van was not a rental, a fact that defendant emphasizes on appeal because, according to defendant's brief, most drug couriers use rental vehicles.

⁴ These are all signs that police are trained to look for in order to recognize because a person who is nervous may possibly be committing a felony.

received, defendant's consent to search the van.⁵ An approximately 40- to 50-fifty minute search of the van revealed no evidence of contraband. Defendant then granted the officers' request to take the van to the CHP's Barstow office for a further search; that search also revealed no contraband. However, after a drug-sniffing canine was allowed access to the van, two kilograms of cocaine were discovered under the right rear quarter panel.

Defendant, upon being confronted with this discovery, changed his statement to the police. He stated that he had come to California from Ohio with a friend named Donny (he believed Donny's last name was Jackson but was not sure). Donny's uncle had passed away and Donny was going to the funeral in California. Defendant decided to go with Donny because he was not working at the time and he wanted to come to California to see the sights and help Donny drive.

Upon arriving in Long Beach on May 16 at 1:00 p.m., they made a telephone call at a pay phone. After the call, an unknown man showed up and took them to a motel room. After Donny left with the unknown man, defendant took a shower and went to a bar. Defendant returned around 9:00 p.m. and slept until Donny returned at midnight. Donny, upon returning, asked defendant if he wanted to stay in California or go back to Ohio to which defendant replied that he wanted to go back to Ohio. Defendant was going to drive the van back to Ohio and leave it at his house when he arrived in Ohio, where the owner could pick it up. At this point, defendant informed the officers that he was willing to take the van back to Ohio and allow the police to set up surveillance on the van, but the police

⁵ Based on Detective Loup's experience, approximately 90 percent of people
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refused because they did not have the money or the manpower to set up such an operation in Ohio.

The police were unable to verify the existence of either the hotel that defendant claimed to have stayed at or the bar that defendant claimed to have visited. They were also unable to speak with the registered owner of the van. The registered owner of the van never showed up, so it was sold at auction.

Defense

Defendant testified at trial. Defendant stated that he was a dump-truck driver in Ohio, but was not working, or going to be working for at least a week, due to the rain. It was during this time that Donny, whom defendant had not seen for two to three years, asked defendant to go with him to California because Donny needed a driver. Defendant denied knowing that cocaine was in the van and stated that he had never seen cocaine in person. Defendant did admit to knowing that cocaine is an illegal substance. The rest of defendant's testimony was generally consistent with his second statement made to police the day he was arrested.

DISCUSSION

1. The Evidence Is Sufficient to Support the Convictions

Defendant contends the convictions must be reversed because there was insufficient evidence presented at trial for a jury to infer that he knew both of the presence of the cocaine in the van and of the cocaine's controlled substance status. Both the transportation

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consent to police searches of their vehicles.

of a controlled substance charge (§ 11352, subd. (a)) and the illegal possession of a controlled possession charge (§ 11350, subd. (a)) require sufficient evidence that defendant knew of the presence of the cocaine and knew of the cocaine's status as a controlled substance.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character.” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.) “As to knowledge of its presence and character, the mere possession of narcotics constitutes substantial evidence that the possessor of the narcotic knew of its nature. [Citations.]” (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 331.) Therefore, according to *Eckstrom*, defendant's possession of the cocaine alone constitutes substantial evidence. Defendant cites *People v. Williams* (1971) 5 Cal.3d 211, 216 stating “Although defendant may have been in constructive possession of the contraband, such possession alone does not satisfy the requirement of knowledge” Here, possession of the cocaine is not the only evidence that supports the conviction.

Knowledge of the presence of contraband and its narcotic nature may be established by circumstantial evidence and any reasonable inference drawn from the evidence. (*People v. Newman* (1971) 5 Cal.3d 48, 52, overruled on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862.) “Further, ‘[k]nowledge of the presence of contraband and of its narcotic content may be inferred from the accused’s conduct or statements at or near the time of his arrest. [Citations.]’ [Citation.]” (*People v. Eckstrom, supra*, 187 Cal.App.3d 323, 331.)

Officer Nester testified that the smell of air freshener permeated throughout the inside of the van, a radar detector was mounted on the dashboard, a road map was on the passenger seat, and a pager, drink cup, and a soda can were all found in the van at the time of the arrest. Officer Nester testified that these are items, when viewed as a whole, that police are trained to identify as indicators of drug trafficking. Further, at the time of the stop, defendant’s voice quivered and stammered, he avoided eye contact, shuffled his feet, and shook and trembled throughout his conversation with the police. These are all signs of suspicious behavior that police are trained to look for in order to recognize when a suspect may be in the process of committing a felony. Also, defendant’s statements to police as to why he was in California changed from the time of the stop (defendant stated in California for his uncle’s funeral) to the time of the arrest (defendant stated in California for friend’s uncle’s funeral).

When viewed as a whole, these circumstances constitute sufficient evidence that would allow a jury to reasonably believe that defendant knew of the presence of the cocaine and its controlled substance status. Officer Nester testified that defendant’s nervous

behavior, his changing statements, and the items found in his car met the modus operandi that police are trained to identify when looking for evidence of drug trafficking. The jury, relying on Officer Nester's testimony, could have reasonably inferred that defendant was participating in drug trafficking.

When viewed as a whole, defendant's possession of the cocaine, along with the circumstances surrounding the arrest, are sufficient to support a jury's inference that defendant knew of the presence of the cocaine within the van and of its narcotic nature. Accordingly, we conclude that sufficient evidence exists to support the convictions.

2. Special Instruction

During jury deliberations, the jury submitted the following inquiry with the court: "We need an interpretation as to whether it is necessary for the defendant to know specifically that cocaine, or if knowledge of any controlled substance is sufficient." The court responded with the following quote from *People v. Guy* (1980) 107 Cal.App.3d 593, 601, footnote 7: "The only knowledge that is required to sustain the conviction is knowledge of the controlled nature of the substance. [Citation.] The defendant need not know the chemical name or the precise chemical nature of the substance. . . ."

Defendant contends that this response to the jury's question constituted an improper prosecution pinpoint instruction because it "misdirected the jury's analysis into concluding that the prosecution did not have to prove that [defendant] knew that cocaine was a controlled substance." Also, defendant contends that this response was tantamount to a directed verdict as it "directed the jury to find that the requisite knowledge was satisfied if [defendant] only knew it was cocaine and regardless of whether he knew it was a controlled

substance.” Rejecting both of these contentions, we hold that the trial court’s response to the jury’s questions was proper.

The court’s answer does not constitute a prosecution pinpoint instruction or a directed verdict as it is merely making clear the meaning of one element of the statute. So long as the original jury instructions are full and complete, the court has discretion under Penal Code section 1138⁶ in determining what further explanation is needed to satisfy a jury’s request for clarification. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) In order to adequately answer a jury’s question, a court may use any available means to facilitate the jury’s understanding of the applicable legal principles. (*People v. Thompson* (1987) 195 Cal.App.3d 244, 250.) The court, in using the quote from *People v. Guy*, properly exercised its discretion and utilized one of its many resources to fully answer the jury’s question and insure that the jury understood the statute.

This court has previously held that a defendant is only required to know that the substance he is transporting is a controlled substance. (*People v. Romero* (1997) 55 Cal.App.4th 147, 151-157.) Defendant has not made any argument (and we can conceive of no such argument) as to why the trial court’s special instruction is in any way inconsistent with this court’s prior holding in *Romero*. The special instruction, which stated “[t]he only knowledge that is required to sustain the conviction is knowledge of the controlled nature

⁶ Penal Code section 1138 provides: “After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in

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of the substance,” is entirely consistent with our holding in *Romero* and therefore was well within the trial court’s discretion.

Further, the court’s answer did not eliminate the requirement that defendant knew of the presence of the controlled substance, as defendant contends in his reply brief. The jury’s question was not directed at what is required to prove defendant’s knowledge of the presence of the cocaine. Rather, it was specifically directed at the knowledge that defendant is statutorily required to have in order to establish that he had knowledge as to the cocaine’s controlled substance status. The trial court is not required to answer questions that are not asked, as defendant contends.

Therefore, as we find no error in the court’s response to the jury’s question, both of these contentions are rejected.

3. CALJIC No. 17.41.1

Defendant also contends that CALJIC No. 17.41.1⁷ is unconstitutional and thus, by giving it as part of the instruction, the trial court violated defendant’s right to trial by jury and his due process rights. We reject this contention.

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the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.”

⁷ CALJIC No. 17.41.1 (1998 new) (6th ed 1996) states: “The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on [penalty or punishment, or] any [other] improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.”

Defendant failed to raise an objection in the trial court to the jury's instruction with CALJIC No. 17.41.1. As such, defendant's claim of error is waived on appeal unless CALJIC No. 17.41.1 affected defendant's substantial rights. (Pen. Code, § 1259.)

Jury nullification has recently been addressed by the Supreme Court within the context of a trial court's excusing a juror for failure to follow the law. The Supreme Court has noted that it is aware of no cases holding "that a trial court violates the defendant's right to a jury trial by excusing a juror who refuses to follow the law." (*People v. Williams* (2001) 25 Cal.4th 441, 449.) While, "as a practical matter, the jury in a criminal case may have the ability to disregard the court's instructions in the defendant's favor without recourse by the prosecution[, this] does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions." (*Ibid.*)

The court further observed that "[i]t long has been recognized that, in some instances, a jury has the ability to disregard, or nullify, the law." (*People v. Williams, supra*, 25 Cal.4th 441, 449.) A defendant can be acquitted despite evidence that establishes guilt. (*Ibid.*) The jury's "“assumption of a power which they had no right to exercise, but to which they were disposed through lenity”" is not subject to review. (*Ibid.*)

Regardless, "“... it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instructions.”" (*People v. Williams, supra*, 25 Cal.4th 441, 451.) This law has long been established by both the United States and California Supreme Courts. (*Id.* at pp. 451-456.) The court may instruct the jury on its obligation to follow instructions given to it and to discharge a juror who refuses to do so. (*Id.* at p. 461.)

CALJIC requires a juror to notify the court if a fellow juror refuses to deliberate or expresses an intent to disregard the law or to use any improper basis, such as punishment, in reaching a verdict. It does nothing more than to remind the jurors of their obligation to follow the instructions. In *People v. Williams*, the Supreme Court makes it clear that CALJIC No. 17.41.1 is consistent with the long-established law that the trial court has the right to instruct the jury on the law and the jury has the duty to obey these instructions. (*People v. Williams, supra*, 25 Cal.4th 441, 451-452.)

Further, CALJIC No. 17.41.1 does not interfere with a defendant's right to a jury trial nor has a chilling effect on juror deliberations. Each juror takes an oath to “well and truly try the cause now pending before this court, and a true verdict render *according only to the evidence presented to you and to the instructions of the court.*” (Code Civ. Proc., § 232, subd. (b), italics added.) The Supreme Court has acknowledged that “caution must be exercised in determining whether a juror has refused to deliberate[,]” as questioning jurors about their deliberations may affect the deliberations themselves. (*People v. Cleveland* (2001) 25 Cal.4th 466, 475.) “The need to protect the sanctity of jury deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations.” (*Id.* at p. 476) CALJIC 17.41.1 does nothing more than remind the jurors of their oath and obligation and instruct the jurors that they are required to aid the court in the detection of oath violators. There is nothing chilling or coercive about reminding the jurors of their obligations. (*People v. Keenan* (1988) 46 Cal.3d 478, 536.)

Therefore, as CALJIC No. 17.41.1 does not affect defendant's substantial rights, we hold that this claim on appeal has been waived because defendant failed to object at trial to the use of CALJIC No. 17.41.1.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P. J.

WARD

J.